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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 JACK STEIN,

12 Petitioner,

13 v.

14 SCOTT FRAKES,

15 Respondent.  
16

CASE NO. C09-5006RBL

ORDER

17 This case has been referred to the undersigned Magistrate Judge pursuant to Title 28  
18 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR  
19 4. The matter is before the court upon petitioner's motion for immediate bail pending the  
20 outcome of the underlying petition for writ of habeas corpus (Doc. 136), petitioner's motion to  
21 expedite the matter (Doc. 138), and several related letters (Docs. 141, 145, 148, & 151).

22 After reviewing the record the court finds and orders as follows:

23 1. Petitioner's request for immediate release is, in essence, a request for a stay of his  
24 state sentence. Such a stay is within the power of the court. 28 U.S.C. § 2251. However, such  
25 relief is not lightly granted.  
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1 When the process of direct review -- which, if a federal question is involved, includes  
2 the right to petition [the Supreme] Court for a writ of certiorari -- comes to an end, a  
3 presumption of finality and legality attaches to the conviction and sentence. The role  
4 of federal habeas corpus proceedings, while important in assuring that constitutional  
rights are observed, is secondary and limited. Federal courts are not forums in which  
to relitigate state trials.

5 Barefoot v. Estelle, 463 U.S. 880, 887-88(1983)(emphasis added). A stay of a state prison  
6 sentence during the pendency of a federal habeas petition has occasionally been warranted, but  
7 such stays are almost invariably stays of execution of the death penalty. As stated in Stepney v.  
8 Lopes, 597 F.Supp. 11 (D. Conn. 1984):

9 Whether to grant the motion [for stay] requires consideration of the effect of denial as  
10 opposed to the grant. A denial would subject the petitioner to execution of his  
11 sentence, i.e. incarceration. It would not bar his release if his petition is ultimately  
12 granted as merited. It does subject him to the sentence of the Superior Court which,  
13 under principles of comity, is entitled to considerable weight. Petitioner has passed  
14 the point of presumption of his innocence. That was stricken by the verdict of the  
15 jury. His case was reviewed as to the legality of his sentence on motion to the trial  
16 court, on appeal to the Connecticut Supreme Court, and, to a limited degree [fn.  
17 omitted], on petition for certiorari. Petitioner therefore is not due the consideration of  
18 one merely accused or even one convicted but who has not exhausted his appeal  
19 rights. [Citation omitted.] Any meritorious writ of habeas corpus constitutes an  
20 adjudication of the illegality of the petitioner's custodial status, presumably from its  
21 inception, and thus any successful petitioner will have been found to have been  
22 wrongfully in custody from its inception and until released on the grant of the writ.  
23 The flip side of the coin is, however, that a stay relieves a petitioner from a sentence  
24 and custody which, if the writ is not ultimately granted, would have been deemed to be  
25 lawful from the outset. Under such circumstances, one who ultimately is found to  
26 have been lawfully subject to custody will have walked free when he should have been  
incarcerated. Granting stays of sentences in these habeas corpus proceedings would  
create the danger that every prisoner would be invited to flood the state or federal  
courts, successively and repeatedly, ad infinitum.

27 Apart from this impact of a grant on the system, a grant would further constitute  
28 an affront to the state criminal prosecution system in that a grant would deny the state  
29 the right to bring to conclusion its criminal prosecutions and the judgments of its  
30 courts after a conviction has been lawfully obtained. The federal court should tread  
31 lightly before such a disruption is visited in the state.

32 Id. at 13 (emphasis added). In order to secure release pending disposition of his Petition,  
33 petitioner must show more than a potentially meritorious habeas claim; he must make "a greater  
34 showing of some special reasons" for stay, some "circumstance making this application  
35 exceptional and deserving of special treatment in the interests of justice." Aronson v. May, 85

1 S.Ct. 3, 13 L.Ed.2d 6 (U.S.N.Y. 1964) (Douglas, J., in chambers on application for bail). A  
2 §2255 defendant is entitled to bail pending review only if he or she can demonstrate special  
3 circumstances or a high probability of success. United States v. Mett, 41 F.3d 1281 (9th Cir.  
4 1994); Lands v. Deeds, 878 F.2d 318, 319 (9th Cir. 1989).

5 Thus, in Stepney v. Lopes, *supra*, and in Bates v. Estelle, 483 F. Supp. 224 (S.D.Tx.  
6 1980), the district court rejected preliminary release of prisoners although each had demonstrated  
7 that incarceration was potentially life-threatening. (Stepney concerned a seriously ill 67 year-old  
8 petitioner, Bates concerned a former state judge fearful of meeting former acquaintances in  
9 prison).  
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11 Here, petitioner has not presented any particularized grounds for the exceptional relief he  
12 seeks. Petitioner has not shown the court a high probability of success or any special  
13 circumstances that warrant an immediate release or stay of his state court conviction and  
14 sentence. Petitioner's motion for immediate release pending resolution of the underlying petition  
15 (Doc. 136) is DENIED.  
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17 2. On October 26, 2009, the Court allowed petitioner to file an amended petition,  
18 and on November 9, 2009, the undersigned directed respondent to file an Answer to that petition.  
19 Giving respondent a reasonable time to formulate an answer, the court requested an Answer  
20 within 45 days. Accordingly, an Answer should be forthcoming. Petitioner's request for  
21 expedition and immediate consideration is unwarranted. A review of the record shows no  
22 exigent circumstances to review the matter *sua sponte*. It is appropriate to wait and allow  
23 respondent to file an Answer to the petition before the court considers the petition.  
24

25 Petitioner's motion to expedite the petition for immediate consideration (Doc. 138) is  
26 DENIED.

1           3.       Finally, petitioner's frequent submissions by letter, which include requests for  
2 court action, compel the court to issue the following warning: Such letters are inappropriate and  
3 all futures requests or pleadings requesting court action must be made in the form of a motion in  
4 compliance with the Federal Rules of Civil Procedure.

5           Plaintiff shall note the requirements of filing and responding to a motion provided by  
6 Local Civil Rule CR 7(b), which states:  
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8           **(b) Motions and Other Papers**

9                   (1) *Obligations of Movant.* The moving party shall serve the motion and a  
10                   proposed order on each party that has appeared in the action, and shall file  
11                   the motion and proposed order with the clerk. The argument in support of  
12                   the motion shall not be made in a separate document but shall be  
13                   submitted as part of the motion itself. If the motion requires consideration  
14                   of facts not appearing of record, the movant shall also serve and file copies  
15                   of all affidavits, declarations, photographic or other evidence presented in  
16                   support of the motion.

17                   All motions shall include in the caption (immediately below the title of the  
18                   motion) the date the motion is to be noted for consideration upon the  
19                   court's motion calendar. See CR 7(d) for scheduling motions and briefing  
20                   deadlines. The form for this notation shall be as follows:

21                   NOTE ON MOTION CALENDAR: [insert date noted for consideration]

22                   (2) *Obligation of Opponent.* Each party opposing the motion shall, within  
23                   the time prescribed in CR 7(d), file with the clerk, and serve on each party  
24                   that has appeared in the action, a brief in opposition to the motion,  
25                   together with any supporting material of the type described in subsection  
26                   (1). If a party fails to file papers in opposition to a motion, such failure  
                    may be considered by the court as an admission that the motion has merit.

                    (3) *Reply Brief.* The moving party may, within the time prescribed in CR  
                    7(d), file with the clerk, and serve on each party that has appeared in the  
                    action, a reply brief in support of the motion, together with any supporting  
                    material of the type described in subsection (1).

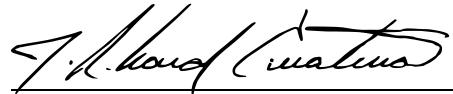
                    (4) *Oral Argument.* Unless otherwise ordered by the court, all motions will  
                    be decided by the court without oral argument. Counsel shall not appear  
                    on the date the motion is noted unless directed by the court. A party  
                    desiring oral argument shall so indicate by typing ORAL ARGUMENT

1 REQUESTED in the caption of its motion or responsive memorandum. If  
2 a request for oral argument is granted, the clerk will notify the parties of  
3 the date and time for argument.

4 (5) *Decisions on Motions*. All motions will be decided as soon as  
5 practicable, and normally within thirty days following the noting date. The  
6 court encourages counsel to call the assigned judge's in-court deputy clerk  
7 to verify that a motion is scheduled for determination if a decision on the  
8 motion has not been received within 45 days of the noting date.

9 4. The Clerk of Court is directed to send a copy of this Order and the Magistrate  
10 Judges' General Order to plaintiff.

11 DATED this 10<sup>th</sup> day of December, 2009.

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13 J. Richard Creatura  
14 United States Magistrate Judge  
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